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Supreme Court, U.S.
FILED
JUL 31 2001
OFFICE OF THE CLERK

No. 00-1649

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. AS A CASE DEVOID OF *MATERIAL* FACTUAL DISPUTES, THE *HEADWATERS* DECISION IS BEING CITED BY LOWER COURTS ON ISSUES OF FUNDAMENTAL FEDERAL LAW FOR PROPOSITIONS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND THAT CREATE A VACUUM FOR LAW ENFORCEMENT POLICY MAKERS.

Rather than involving – as plaintiffs assert in opposition to certiorari – "the mundane question of whether a district court correctly applied Fed.R.Civ.P. 50," *Headwaters* has been cited by the lower courts on fundamental issues of constitutional law inconsistent with the decisions of this Court. This case is unusual in the sense that the trial judge was able to rely upon videotapes documenting each use of force at issue and thus, exaggerations of plaintiffs and hyperbole of counsel embraced by the Ninth Circuit as "factual disputes" worthy of jury resolution, were properly disregarded by the court below, revealing purely legal issues. The truly "unprecedented" aspect of the case is not the "use of force" at issue, but rather the undisputed level of resistance to arrest by plaintiffs which evidenced a stalwart determination to delay lawful arrests, obstruct justice and cause the maximum disruption of police services to any community plaintiffs chose to target.[1]

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[1] It is a measure of plaintiffs' unsupportable position that they are forced to argue that there is no evidence that they were actively resisting arrest (Resp. Brief at 20). It was undisputed that plaintiffs fabricated, transported and employed twenty-five pound metal devices for the sole purpose of obstructing law enforcement efforts to effect their lawful arrests. This context underscores why law enforcement policy makers approved a measured, tactical use of force to overcome the resistance.

A. The *Headwaters* Decision Is Being Cited By Lower Courts On Issues Of Fundamental Federal Law Inconsistent With The Decisions Of This Court.

In the short time since its publication and the writing of this brief, the *Headwaters* decision has been cited by the Ninth Circuit for substantive Fourth Amendment law and on qualified immunity issues.

In *Deorle v. Rutherford*, 242 F.3d 119 (9th Cir. 2001), the plaintiff was injured when shot by a police officer with a lead-filled "bean bag." In determining that the force used was excessive as a matter of law, the court referenced the *Headwaters* decision seven times. The court also cited *Headwaters* in denying qualified immunity for the proposition that, in an excessive force case, "the qualified immunity test is the same as the test on the merits."[2]

In *Clavette v. Sweeney*, 132 F.Supp.2d 864 (D. Ore. 2001), a homeowner sued members of a police department, claiming he was falsely arrested and subjected to excessive force when he resisted efforts of firefighters to enter his property. The district court denied the defendants summary judgment on the excessive force claim, citing *Headwaters* for the proposition that: "If evidence suggests officers could have used other tactics to effect an arrest, the reasonableness of the force they used is a question for the jury." *Id.* at 871. In denying qualified immunity, the district court also cited *Headwaters* for the proposition that: "the law regarding the

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[2] As will be discussed in the next section of this brief – the Ninth Circuit's conclusion that the issue of excessive force and qualified immunity are one and the same is in direct conflict with this Court's recent holding in *Saucier v. Katz*, 121 S.Ct. 2151 (2001).

use of force was clearly established at the time of the events at issue." *Id.* at 872.

Thus, the lower courts do not share plaintiffs' view that *Headwaters* represents a "mundane" application of Federal Rule 50.

B. There Are No *Material* Disputed Facts.

Plaintiffs also assert that review is not warranted "[b]ecause this dispute is one of fact, not law. . ." Resp. Brief at 12.

First of all, the plaintiffs do not identify any disputed facts that are material, if the appropriate constitutional standards are applied. It remains uncontroverted that all plaintiffs were subject to arrest as a matter of law, that all plaintiffs resisted arrest by encasing their arms in steel devices fabricated and developed for the sole purpose of resisting arrest, and that all plaintiffs were taken into custody without physical injury following the limited application of pepper spray. All of this is admitted by plaintiffs and documented on the videotapes submitted to this Court and to the courts below.

Rather than identify *material* factual disputes, plaintiffs continue to focus on questions of no legal consequence. Thus, plaintiffs discuss the purported "ineffectiveness" of the subject use of pepper spray, claiming that "the use of the chemical agent did little or nothing to expedite the arrest of the demonstrators." Resp. Brief at 18-19. Ignoring the fact that the applications of pepper spray caused the majority of the demonstrators to disengage from their Black Bear devices – plaintiffs cite no authority for the proposition that the "effectiveness" of the force used is relevant to the issue of whether or not it is reasonable under the Fourth Amendment.

Plaintiffs also claim that a "dispute" as to the number of protestors involved "represents conflicting evidence

on a material fact." *Id.* at 19.[3] Again, plaintiffs cite no authority and present no cogent argument why a conflict as to the number of protesters involved constitutes a material issue. In fact, the videotapes again provide uncontroverted evidence, and plaintiffs testified to the involvement of planning, media, affinity, and support groups.

Plaintiffs posit that the existence or nonexistence of "exigencies" at the time of the subject arrests is a material issue. Once again plaintiffs fail to cite any authority for the proposition that the use of force to effect a lawful arrest requires an emergency. No such authority exists, and for good reason. In each of the incidents, law enforcement officials responded to the requests of property owners to remove trespassers intentionally interfering with lawful use of the property by its owners. No "emergency" is required to justify the arrest of someone breaking the law. Rather, law enforcment officers would violate their sworn duties to enforce the law if they chose not to arrest due to the absence of "exigencies."

Plaintiffs also cite "evidence that the officers had declined to use more effective and less painful alternatives to arrest" as evidence of a material dispute. Even assuming *arguendo* that the use of an electric-powered steel saw within inches of arms and hands is a "better alternative" than the use of pepper spray (a substance which poses no known risk of injury), it is well established that law enforcement officials are not required to contemplate and select the most "effective" means

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[3]Plaintiffs neglect to point out that scores of activists were gathered outside both the Pacific Lumber Company office and the office of Congressman Riggs in Eureka, and others can be heard from undisclosed locations throughout the forest at Bear Creek, at the time of the plaintiffs' "direct actions." The videotape evidence is uncontroverted on this issue.

to accomplish a lawful arrest.[4] *Scott v. Henrich*, 39 F.2d 912, 915 (9th Cir. 1994) (requiring officers to find and choose the least intrusive alternative would require them to exercise "superhuman judgment") *cert. denied*, 115 S.Ct. 2612 (1995).

Likewise, the Ninth Circuit's suggestion that the officers should have "negotiated" with the plaintiffs raises an issue of no legal consequence. To begin with – as plainly seen on the videotapes – the officers repeatedly *pleaded* with the plaintiffs to submit to arrest by releasing from the Black Bear devices These pleas where uniformly ignored by the plaintiffs. More importantly, the Ninth Circuit's "negotiation requirement" represents an unprecedented exception in Fourth Amendment jurisprudence. Until the *Headwaters* decision, no court has ever required law enforcement officers to engage in "negotiation" with political activists as a prerequisite to lawful custodial arrest.[5]

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[4] Nor was there any conflict in the evidence of defendants' continuing efforts to find safer alternatives to the grinder. Indeed, plaintiffs offered evidence that a hinged pipe cutter could be used without the fire risk posed by the grinder. This had been tested by defendants and found wanting because of the razor sharp edges created and the potential for serious shoulder injuries to the protesters from the torque of the device. It should be noted that use of the grinder was truly "unprecedented" when developed. There was no pre-*Headwaters* precedent in the Ninth Circuit decisional law approving the removal of heavy metal sleeves from the bodies of arrestees by use of an electric grinder, nor a history of any other law enforcement department doing so before the technique was developed by the Humboldt County Sheriff's Department. Unlike the direct application of pepper spray now taught in P.O.S.T. certified training, this "unprecedented" technique is endorsed by only plaintiffs and the Ninth Circuit panel as plaintiffs could not produce a single law enforcement expert to testify that it was a better alternative.

[5] As noted above, the *Headwaters* decision has already been cited for the (erroneous) proposition that law enforcement officers

[footnote continued]

It is patently unreasonable to expect law enforcement officers to weigh and balance the merit or lack of merit of the political agendas of those engaged in civil disobedience before carrying out their sworn duties to effect lawful arrests. Law enforcement officers should not be made to be participants in political debate, nor should they be expected to play the role of mediator, arbitrator, or psychologist. In the final analysis, the Ninth Circuit's decision renders law enforcement impotent to perform its most fundamental task: to enforce the laws of the jurisdiction served. This function is the very foundation of a law-based society – the alternative is anarchy.

In short, as noted above, the *material* facts regarding the use of force in this case are uncontroverted and, therefore, resolution of the underlying constitutional issue was a pure question of law and represents a threshold constitutional determination by the Ninth Circuit.

C. The Decision Of The Ninth Circuit Provides An Improper Framework For Analysis Of Section 1983 Cases And Requires Law Enforcement Policy Makers To Work In A Vacuum.

This Court, in *Saucier v. Katz*, recently emphasized the importance of resolving the underlying constitutional issue in a case alleging the use of excessive force. In reversing the Ninth Circuit in *Katz*, this Court has instructed both the district courts and the courts of appeal "to concentrate at the onset on the definition of the constitutional right, and to determine whether, on the facts alleged, a constitutional violation could be found . . ." 121 S.Ct. at 2159. The reason for this, as

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must be denied summary judgment if there is evidence that alternative means were not attempted. *See, Clavette*, 132 F. Supp. 2d at 871.

this Court has explained, is to establish threshold constitutional parameters and standards to provide guidance to law enforcement officers and other government officials:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.
>
> 121 S.Ct. at 2156.

In *Headwaters,* the Ninth Circuit has determined, as a matter of law, that it is not enough for law enforcement policy makers to rely upon research, technical information and legal advice, in approving a tactical use of force that *no* law enforcement expert opines is excessive. Instead, if *any* alternative is suggested, jury resolution of the question of whether the use of force is unreasonable under the *Graham* standard is necessary. This threshold constitutional determination can be relied upon (and has been cited) in subsequent cases to define the parameters of both excessive force and qualified immunity. This is not a "mundane" Rule 50 determination.

Plaintiffs also ignore the split of authority in the circuits concerning the use of *de minimis* force resulting in no physical injury.[6] In some circuits, the use of *de minimis* force resulting in no physical injury forecloses the possibility of a section 1983 claim for excessive force.

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[6] As in the courts below, plaintiffs continue to choose terms such as "excruciating," "agonizing," "searing," and "extreme" to describe their reactions to pepper spray, and, for the first time in

[footnote continued]

Nolan v. Isbell, 207 F.3d 1253 (11th Cir. 2000); *Jackson v. R.E. Culbertson,* 984 F.2d 699, 700 (5th Cir. 1993); *Joos v. Ratliff,* 97 F.3d 1125 (8th Cir. 1996) *per curiam.* In contrast, the court in *Headwaters,* consistent with Ninth Circuit decisional law, permitted the prosecution of an excessive force claim in the complete absence of physical injury, holding that it is "well settled" within the circuit that a plaintiff may recover "nominal damages without proof of actual injury." App., *infra,* 20A. The *de minimis* force issue has nothing to do with Rule 50, and granting review would allow this Court to resolve an inter-circuit conflict.

II. AT A MINIMUM – THE *HEADWATERS* DECISION SHOULD BE SUMMARILY REVERSED OR VACATED AND REMANDED FOR RECONSIDERATION IN VIEW OF *SAUCIER v. KATZ.*

On June 18, 2001, after the filing of defendants' petition for writ of certiorari, this Court issued its decision in *Saucier v. Katz.* The *Headwaters* decision is in direct conflict with *Katz* on the issue of qualified immunity.

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their brief to this Court, claim that they suffered "severe physical injuries." Resp. Brief at 11. There was not one iota of evidence presented at trial or anywhere else to substantiate the claim that any plaintiff suffered a physical injury – severe or otherwise. Nothing in the OC studies conducted by the Justice Department or by anyone else supports the unprecedented reactions described by plaintiffs at trial. Indeed, all law enforcement officers must be exposed to a "full-blast" as part of certification training. Furthermore, the videotaped interview of Spring Lundberg conducted shortly after her arrest at the Pacific Lumber incident, shows her laughing, smiling, and in no apparent distress, and cannot be reconciled with plaintiffs' courtroom characterizations of severe pain and distress. See Defendants' Videotape Lodging II. Although it is not disputed that the application of pepper spray causes pain – the intended effect with *any* pain compliance technique – the evidence was undisputed that this pain subsided when

[footnote continued]

Thus, at a minimum, this Court should grant certiorari and summarily reverse on the qualified immunity issue, or vacate the opinion and remand for reconsideration in light of *Katz*.

In *Katz*, as in *Headwaters*, the Ninth Circuit denied qualified immunity on the grounds that a triable issue of fact on the constitutional question precluded granting of qualified immunity to the law enforcement officer. *Katz*, like *Headwaters*, involved the use of force to effect the arrest of a political protester. The use of force in *Katz*, like *Headwaters*, did not result in any physical injury to the plaintiff.

In direct conflict with the Ninth Circuit's holding in *Headwaters* that the general proposition that "the law concerning the use of excessive force is clearly established" is the level of inquiry, this Court held that a more particularized analysis is required:

> . . . There is no doubt that *Graham v. Connor* [ ] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet this is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must be 'clearly established' in a more particularized, and hence, more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." [citation omitted]. . . . If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. [citation omitted]

121 S.Ct. at 2156.

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the OC solution was washed from plaintiffs' faces and eyes by officers with repeated applications of water from spray bottles within minutes of the use of OC. See Videotape Lodgings I and II.

Contrary to the decision in *Katz*, *Headwaters* instructs that no particularized analysis is necessary, and no case law or other authority need be reviewed in analyzing qualified immunity in the context of an excessive force claim.

Neither the Ninth Circuit nor plaintiffs have cited a single case which would have put the defendants on notice that the subject applications of pepper spray constituted excessive force. On the other hand, as noted by the district court in granting judgment as a matter of law: "Several courts have specifically held that the use of OC as a pain compliance instrument, rather than a means of subduing an attacking or violent suspect, is reasonable as a matter of law." Petitioners' Appendix B, 50a.

In the context of this legal landscape, the Ninth Circuit's erroneous application, or, more accurately, non-application, of the "clearly established" prong represents an extreme departure from this Court's holding in *Saucier v. Katz*. No warning whatsoever is provided to law enforcement officials formulating use-of-force policy.

CONCLUSION

Review of *Headwaters* is necessary to correct the misapplication of fundamental Fourth Amendment principles so that law enforcement in the Ninth Circuit may enforce the law without unfettered exposure to groundless civil actions.[7]

Respectfully submitted,

NANCY K. DELANEY

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[7] If the Court does not grant certiorari on both the constitutional and qualified immunity issues, it would be appropriate to grant certiorari as to the qualified immunity question and summarily reverse, *Helvering v. Weise*, 292 U.S. 614 (1934), or remand to the Ninth Circuit for reconsideration in view of *Saucer v. Katz*, *see*, *Kirwan v. Romano*, 425 U.S. 929 (1976); *Lash v. Aikens*, 425 U.S. 947 (1976).